

COMPLIANCE BOARD OPINION NO. 95-2

June 20, 1995

Daniel J. Earnshaw, Esquire

The Open Meetings Compliance Board has considered your complaint dated May 15, 1995, in which you allege that the Board of Supervisors of Elections of Baltimore City violated the Open Meetings Act at its April 7, 1995, meeting. The alleged violation occurred prior to the scheduled starting time of that meeting. According to the affidavits with your complaint, members of the public who arrived at the City Board office prior to the scheduled 3:00 p.m. starting time of the meeting were not admitted to the meeting room until 3:00 p.m. All of the observers report seeing the members of the City Board enter the meeting room and close the door prior to 3:00 p.m. In addition, you supplied the Compliance Board with a videotape confirming that such a closed-door session took place.

In a timely response, the City Board acknowledged that a closed session had indeed occurred prior to the 3:00 p.m. starting time of the meeting. The City Board's description of the event is as follows:

At approximately 2:45, an employee of the Baltimore City Board informed the members of the Board that there were approximately 10 or 15 persons who were present for the meeting who expressed their desire to "give a speech" at the meeting. The employee inquired how to respond to the visitors and the Board, in the presence of State Administrator Gene Raynor, City Board Administrator Barbara Jackson and Counsel Sharon B. Benzil, Assistant Attorney General, closed the door to the board room for the purposes of discussing the method by which the visitors could be accommodated on the agenda for the meeting. The Board discussed what procedures would be employed or provided to accommodate the visitors' desire to "make a speech" and further discussed, with counsel, legal advice concerning the request by the visitors, who had not made any previous request to be placed upon the agenda. At no time did the Baltimore City Board consider or transact any public or other business other than that described above.

After approximately 10 minutes of discussion, the Board decided to accommodate the desire of the visitors to speak and opened the door to start the Board meeting, at which time one of the visitors, Matthew Iwicki, Esquire, was permitted to "make a speech" that lasted more than 30 minutes. Additional visitors were permitted the opportunity to speak, both before and after the Board deliberated, in open session, upon a proposal related to a "verification mailing" to be addressed to the State Administrative Board of Election Laws.

Your complaint raises two issues: (1) Was the City Board permitted to conduct this discussion in closed session? (2) If so, did the City Board violate the Act by failing to follow the Act's procedural prerequisites to closing a meeting?

I

Applicability of the Act

The initial step in analyzing this or any other complaint of an Open Meetings Act violation is to determine whether the Act applies. If it does not, then perforce no violation will have occurred. The Act applies if (i) the entity involved is a "public body," (ii) the discussion is at a "meeting," and (iii) the topic of the discussion is one that has not been excluded by law from the scope of the Act. *See* §§10-503(a) and 10-505 of the State Government Article, Maryland Code.

The first two of these elements are unquestionably met. The City Board is a "public body," as defined in §10-502(h)(1). Further, the discussion by the City Board prior to its scheduled starting time itself constituted a "meeting," because a quorum of the City Board was engaged in "the consideration or transaction of public business." §10-502(g). In our view, a discussion of how to accommodate the desire of members of the public to participate at a meeting is itself a matter of "public business."

Whether this discussion is excluded from the scope of the Act is a more difficult issue. With certain exceptions that are not pertinent here, the Act "does not apply to ... a public body when it is carrying out ... an executive function" §10-503(a)(1)(i). Hence, if the City Board's discussion of accommodating the visitors amounted to "an executive function," then the Act was inapplicable and no violation could have occurred.

The term "executive function" is defined to mean "the administration of ... a law" §10-502(d)(1). This definition has rightly been characterized by the Attorney General's Office as "amorphous." 78 *Opinions of the Attorney General* ____ (1993) [Opinion No. 93-028, at 4 (July 289, 1993)].¹ In general, an activity "would be an executive function – and the Act would not apply – if the activity 'looks to or facilitates the administration, execution or implementation of a law already in force and effect.'" Opinion No. 93-028, at 5 (quoting *Scull v. Montgomery Citizens League*, 249 Md. 271, 282, 231 A.2d 92 (1968)).

Although the question is a close one, the Compliance Board concludes that the City Board's discussion did not fall within the executive function exclusion. When the City Board was discussing how to accommodate the visitors' request to speak, it was not administering any identifiable law or policy "already in force and effect." Rather, the City Board was presented with an administrative issue that it had not previously encountered; if anything, the City Board was formulating a new policy to deal with this unanticipated situation.

II

Legality of Closing the Meeting

Of course, to say that a discussion is subject to the Act does not mean that the discussion must be conducted in open session. If one of the fourteen exceptions in §10-508(a) fits a discussion, then the discussion may be held in closed session.

One of these exceptions, §10-508(a)(7), does apply. A public body may meet in closed session to "consult with counsel to obtain legal advice." It is undisputed that the City Board's counsel, Assistant Attorney General Sharon B. Benzil, was present during the closed discussion.² As the City Board's response indicates, Ms. Benzil was asked questions by her client and provided advice concerning the visitors' request to speak. Because the closed discussion on this topic was so brief, the Compliance Board has no reason to conclude

¹ As the Attorney General pointed out in that opinion, the initial step in analyzing the "executive function" exclusion is to consider whether the activity in question fits within another function defined in the Act. If it does, then the activity cannot fall within the "executive function." See §10-502(d)(2). Here, the discussion about accommodating the visitors does not fall within any other function defined in the Act. The other defined terms are "advisory function," "judicial function," "legislation function," "quasi-judicial function," and "quasi-legislative function." See §10-502(b), (e), (f), (i), and (j).

² The "legal advice" exception may not be invoked unless the public body's counsel is present. See Compliance Board Opinion 93-6 (May 18, 1993).

that the discussion went beyond this advice-rendering activity.³ Hence, the Compliance Board is of the opinion that the City Board had authority under the Open Meetings Act to close this discussion to the public.

III

Procedural Requirements

The Open Meetings Act requires a recorded vote, open to the public, before a public body may meet in closed session. §10-508(d)(1) and (2)(i). A public vote is required so as to afford a member of the public who witnesses the vote an opportunity to object to the closing of the session. *See* §10-508(d)(3). Moreover, the presiding officer must "make a written statement of the reason for closing the meeting, including a citation of the authority under this section, and a listing of the topics to be discussed." §10-508(d)(2)(ii).

Because it is evident that the City Board did not comply with these requirements, in that respect it violated the Act.⁴

OPEN MEETINGS COMPLIANCE BOARD

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³ When a public body invokes the "legal advice" exception, it must confine its discussion to an interchange with its counsel. *See* Compliance Board Opinion 93-11 (November 30, 1993).

⁴ Under the Act, the opinions of the Compliance board are "advisory only." §10-502.5(i)(1). The Compliance Board has no enforcement authority. §10-502.5(i)(2).